

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 1997 SESSION

<p>FILED</p> <p>July 29, 1997</p> <p>Cecil Crowson, Jr. Appellate Court Clerk</p>

ALLEN LLOYD SMITH,)	NO. 03C01-9511-CR-00351
)	
Appellant,)	KNOX COUNTY
)	
V.)	HON. WILLIAM M. DENDER, JUDGE
)	
STATE OF TENNESSEE,)	(Post-Conviction)
)	
Appellee)	
)	

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OPINION FILED: _____

AFFIRMED

William M. Barker, Judge

Opinion

The Appellant, Allen Lloyd Smith, appeals as of right the Knox County Criminal Court's denial of his petition for post-conviction relief. He argues on appeal that his indictment was defective and that his trial attorney provided ineffective assistance of counsel. We have reviewed the record on appeal and find no merit to the Appellant's contentions. Accordingly, we affirm the trial court's judgment.

I. Factual Background

The victim and her daughter had accompanied the victim's father to Knoxville, Tennessee, and were staying in a hotel room while the father visited friends. At some point, the victim ordered food for herself and her daughter from the hotel's room service menu. Approximately five minutes later, somebody knocked on the door. The victim, thinking that it was room service, opened the door and the Appellant forced his way inside the room. The Appellant pulled out a razor blade box cutter and threatened the victim with her life, robbed her of her money, and forced her to take off her pants and panties.

The Appellant forced the victim into the bathroom, where he made her sit on the sink exposing her genitals to him. He digitally penetrated her, performed cunnilingus on her, and finally attempted penile penetration. The Appellant was interrupted by hotel room service delivering the victim's order and he escaped from the hotel room. He was later arrested and gave a statement to police officers where he admitted to his sexual acts, but claimed that they were consensual.

A jury of his peers found the Appellant guilty as charged, and he was later sentenced to twenty years imprisonment for the aggravated rape and eight years for the attempted aggravated rape, to be served concurrently. He appealed his convictions and sentence and this Court affirmed his convictions, but reduced his sentence for aggravated rape to seventeen years. State v. Allen Lloyd Smith, C.C.A. No. 03C01-9203-CR-91 (Tenn. Crim. App., Knoxville, Mar. 18, 1993). The Tennessee Supreme Court denied his petition for permission to appeal on July 6, 1993. The

Appellant's petition for post-conviction, after a hearing, was dismissed on January 5, 1996. The Appellant now appeals the dismissal of his post-conviction petition.

II. The Indictment

The Appellant first argues that his indictment was fatally defective and deprived the trial court of subject-matter jurisdiction because it did not allege the requisite mens rea for aggravated rape. The Appellant's argument has no merit.

The indictment alleged that the Appellant "unlawfully and forcibly and coercively, while armed with a deadly weapon, sexually penetrate[d the victim]." Even though the indictment did not explicitly state the requisite mens rea for aggravated rape, it nevertheless stated the mens rea implicitly by alleging that the Appellant committed these acts "unlawfully and forcibly and coercively."

The Tennessee Code defines coercion as "threat of kidnapping, extortion, force or violence to be performed immediately or in the future . . ." Tenn. Code Ann. § 39-13-501(1) (1991). Black's Law Dictionary defines force as "[p]ower, violence, compulsion or constraint exerted upon or against a person or thing. . . . Commonly the word occurs in such connections as to show that unlawful or wrongful action is meant." Black's Law Dictionary 644 (6th ed. 1990). When an indictment alleges that an individual has unlawfully, forcibly, and coercively sexually penetrated his victim with the use of a deadly weapon, that indictment necessarily implies that those acts were committed at least recklessly, if not knowingly or intentionally. State v. Burrell, C.C.A. No. 03C01-9404-CR-00157 (Tenn. Crim. App., Knoxville, Feb. 11, 1997); see also State v. John James, C.C.A. No. 01C01-9601-CR-00016 (Tenn. Crim. App., Nashville, Mar. 27, 1997); State v. Larry Steve Wilson, C.C.A. No. 03C01-9511-CC-00355 (Tenn. Crim. App., Knoxville, Mar. 27, 1997); State v. Milton S. Jones, C.C.A. No. 02C01-9503-CR-00061 (Tenn. Crim. App., Jackson, Mar. 7, 1997). We conclude that the necessary mens rea is implicitly included in the charging instrument, and therefore, the indictment is sufficient.

III. Ineffective Assistance of Counsel

The Appellant also contends that his constitutional right to the effective assistance of counsel was violated. This issue is without merit.

In reviewing an appellant's Sixth Amendment claim of ineffective assistance of counsel, this Court must determine whether the advice given or services rendered by the attorney are within the range of competency demanded of attorneys in criminal cases. Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To prevail on a claim of ineffective counsel, a petitioner "must show that counsel's representation fell below an objective standard or reasonableness" and that this performance prejudiced the defense. There must be a reasonable probability that but for counsel's error the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88, 692, 694, 104 S.Ct. 2053, 2064, 2067-68, 80 L.Ed. 674 (1984); Best v. State, 708 S.W.2d 421, 422 (Tenn. Crim. App. 1985).

In making his ineffective assistance of counsel argument, the Appellant first argues that his attorney failed to request a jury instruction on the consent defense. The Appellant raised, and this Court decided, this issue on direct appeal. A panel of this Court found that it was error for the Appellant's counsel to not request jury instructions on the consent defense, but found such error harmless because a rape conviction could not have been sustained if the evidence showed that the victim consented to sex. Allen Lloyd Smith, C.C.A. No. 03C01-9203-CR-91.

The Appellant also argues that his counsel was ineffective because he failed to adequately investigate his case in that he did not obtain a copy of the victim's medical report. According to the Appellant, the evidence at trial suggested two incidents of forcible conduct by the Appellant; namely, that he held a box cutter against the victim's throat and that he forcefully digitally penetrated the victim's vagina. The medical report, the Appellant claims, would have shown that the victim suffered no physical injuries and, therefore, it would have corroborated the Appellant's contention that the sexual acts were consensual. The Appellant failed to introduce a copy of the medical report at the post-conviction hearing. Without the medical report in the record, we

cannot speculate as to its contents. Therefore, we are unable to review the Appellant's claim that he has suffered prejudice. See Wade v. State, 914 S.W.2d 97, 102 (Tenn. Crim. App. 1995); Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990).

The Appellant finally argues that his trial attorney provided ineffective assistance of counsel because he failed to request exculpatory materials from the State prosecutors. This allegation mainly pertains to the victim's elusive medical report. Again, the Appellant's trial counsel may have erred in not requesting the State prosecutors to provide exculpatory materials. However, the Appellant has not introduced any evidence concerning the medical report or any other exculpatory evidence and has, therefore, failed to show that he was prejudiced by his counsel's actions.

Accordingly, the Knox County Criminal Court's dismissal of the Appellant's post-conviction petition is affirmed.

WILLIAM M. BARKER, JUDGE

CONCUR:

GARY R. WADE, JUDGE

CURWOOD WITT, JUDGE